

1 Honorable Marsha J. Pechman  
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8 UNITED STATES DISTRICT COURT  
9 FOR THE WESTERN DISTRICT OF WASHINGTON  
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11 CAP Co., Ltd., Case No.: 2:14-cv-01899-MJP  
12 Plaintiff,  
13 vs.  
14 MICROSOFT CORPORATION;  
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16 Defendant.  
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**PLAINTIFF CAP CO., LTD.'S MOTION  
TO RECONSIDER**

1 Pursuant to FRCP Rules 60 and Local Rule 7(h)(2), CAP Co. hereby files this motion for  
 2 reconsideration of the final judgment entered by the Court on April 6, 2015.

3 **I. THE COURT'S DISMISSAL OF CAP CO.'S DIRECT INFRINGEMENT CLAIMS**  
 4 **IS ERRONEOUS**

5 Microsoft's Motion to Dismiss CAP Co.'s Amended Complaint sought dismissal of CAP  
 6 Co.'s indirect and willful infringement claims. Microsoft did not move to dismiss CAP Co.'s direct  
 7 infringement claims. CAP Co.'s allegations for direct infringement easily pass the pleadings hurdle  
 8 established by *Twombly* and *Iqbal*. Nevertheless, the Court sua sponte dismissed the Plaintiff's  
 9 direct infringement claims with prejudice. CAP Co. submits that this decision constitute manifest  
 10 error justifying reconsideration under Local Rule 7(h).

11 The Court's Opinion erroneously equates willful infringement with direct infringement  
 12 which may explain why the Court only discusses the elements of willful infringement before  
 13 dismissing both willful and direct infringement. Dkt. 70 at 5 ("...alleging both indirect (induced to  
 14 infringe and contributory infringement) and direct (willful) infringement"); *id.* ("II. Direct/willful  
 15 infringement (§ 271(a))"; *id.* at 8 ("Regarding the direct infringement cause of action, the Court  
 16 finds that Plaintiff's pleadings fail to satisfy either elements of the [willful infringement] claim." As  
 17 direct and willful infringement have entirely different pleading standards, CAP Co. requests the  
 18 Court to withdraw its judgment dismissing CAP Co.'s direct infringement claims.

19 If it were the case that the Court intended to dismiss CAP Co.'s direct infringement claims  
 20 without explanation, such would be contrary to controlling case law which first requires the trial  
 21 court to take "proper procedural steps." *Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337,  
 22 1341 (9th Cir. 1981). Such steps include "notify[ing] the plaintiff of the proposed action and  
 23 afford[ing] him an opportunity to submit written argument in opposition." *Id.* "In addition, the court  
 24 must give a statement of the reasons for dismissal, and an opportunity to amend unless the complaint  
 25 is clearly deficient." *Id.*

26 Here, the Court only examined the elements of indirect and willful infringement before  
 27 dismissing the entire lawsuit with prejudice. To put another way, the Court provided no explanation  
 28 for dismissing Plaintiff's direct infringement claims, and Plaintiff was not given any opportunity to

1 amend granted the sua sponte dismissal was with prejudice. These procedural deficiencies alone are  
 2 enough to constitute an abuse of discretion. As there was no substantive, or in fact, any discussion  
 3 of CAP Co.’s direct infringement claims, the Court has failed to make the necessary finding that  
 4 “plaintiff[] cannot possibly win relief.” *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir.  
 5 1988). The Court’s dismissal was improper.

6       **A. CAP Co.’s Direct Infringement Claims Satisfy the Requisite Pleadings Standard**

7       The Court’s examination of the two elements of willful infringement provides no basis to  
 8 dismiss CAP Co.’s direct infringement claims. *See* Dkt. 70 at 5-8. Direct infringement requires  
 9 neither knowledge of the Patents-in-Suit nor intent to infringe. In *In re Bill of Lading Transmission*  
 10 & *Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012), the Federal Circuit found  
 11 that the “[f]orms control,” and held that “...whether [plaintiff]’s amended complaints adequately  
 12 plead direct infringement is to be measured by the specificity required by Form 18.” *Id.*

13       Form 18 provides a sample complaint for direct patent infringement. *Id.* Form 18 requires  
 14 (1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement  
 15 that defendant has been infringing the patent ‘by making, selling, and using [the device] embodying  
 16 the patent’; (4) a statement that the plaintiff has given the defendant notice of its infringement; and  
 17 (5) a demand for an injunction and damages. *Id.*

18       CAP Co. has met each of the elements required under Form 18. *See* CAP Co.’s AC.  
 19 Paragraph 3 of the AC meets the first element. *Id.* at ¶3 (“This is an action for infringement of a  
 20 United States patent. Accordingly, this action arises under the patent laws of the United States of  
 21 America, 35 U.S.C. § 1 *et seq.*, and jurisdiction is properly based on 35 U.S.C. § 271 and 28 U.S.C.  
 22 § 1338(a)”). Paragraphs 6-8, 14, and 21 meet the second element. Paragraphs 15 and 22 meet the  
 23 third element. Paragraph 12 satisfies the fourth element. *Id.* (“On information and belief, Microsoft  
 24 has known of CAP Co.’s patents at least since the service of the Original Complaint in this matter  
 25 on July 3, 2014”). The section titled “Prayer for Relief” satisfies the last element of Form 18. *Id.* As  
 26 CAP Co.’s direct infringement claims fully comply with the requirements of Form 18, they  
 27 necessarily survive any *Twombly* and *Iqbal* challenge. CAP Co. requests that the Court reinstate the  
 28 direct infringement claims.

1       **II. CAP CO. SHOULD HAVE BEEN GIVEN LEAVE TO AMEND ITS INDIRECT**  
 2       **INFRINGEMENT CLAIMS**

3           The Order erroneously concludes that CAP Co. could not remedy any deficiencies in its  
 4 complaint by amendment. The Court concludes that CAP Co. previously amended its complaint  
 5 after receiving Microsoft's initial Motion to Dismiss and thus had the opportunity to add to its  
 6 indirect infringement allegations, but chose not to. The Court also took judicial notice that one of  
 7 Microsoft's accused products, Windows, has substantial non-infringing uses that would defeat a  
 8 claim of contributory infringement. Finally, the Court concluded that the Amended Complaint  
 9 provided no evidence that Microsoft specifically intended to have its customers infringe the patents.

10          CAP Co.'s Amended Complaint made only one relevant change – it made clear that  
 11 plaintiff's complaint excluded claims for pre-filing indirect infringement and willful infringement.  
 12 This change addressed the primary argument in Microsoft's motion which asserted that **pre-filing**  
 13 **knowledge of the patents** was a necessary element for proof of such claims. CAP Co. made no  
 14 other changes to these claims, instead choosing to resist Microsoft's secondary argument regarding  
 15 the additional detail necessary to support its indirect and willfulness claims for post-filing conduct  
 16 – a period during which Microsoft obviously had notice of the patents and the claims of  
 17 infringement. CAP Co. believed at the time of its amendment, and submits that the allegations of its  
 18 complaints do provide sufficient support, when all inferences are drawn in its favor, for its claims  
 19 for contributory and induced infringement. In any event, CAP Co. should be given an opportunity  
 20 to address the deficiencies upon which the Court premised its dismissal.

21          CAP Co., of course, does not dispute that Windows has substantial non-infringing uses. That,  
 22 however, is not the issue of contributory infringement presented in the case. Rather, the issue is  
 23 whether any components of the accused products that Microsoft's customers use to directly and  
 24 indirectly infringe the patents are “[a] material component for use in practicing the patented claim-  
 25 or patented method that is not a staple article of commerce suitable for substantial non-infringing  
 26 use ... with knowledge that the component was especially made or adapted for use in an infringing  
 27 manner.” *i4i Ltd. P'ship v. Microsoft Corp.*, 589 F.3d 1246, 1264 (Fed. Cir. 2009), *modified on other*  
 28 *grounds*, 598 F.3d 831 (Fed. Cir. 2010).

1       In that case, the Federal Circuit held that while the accused product was Microsoft Word,  
 2 the component (or “material or apparatus” within the meaning of the statute) was the XML editor  
 3 feature within some versions of the product:

4       Microsoft also argues that the district court erred by instructing the jury to  
 5 focus on the custom XML editor, rather than all of Word, when deciding  
 6 whether any noninfringing uses were “substantial” ...the district court did not  
 7 abuse its discretion. As we explained in *Lucent Techs., Inc. v. Gateway, Inc.*,  
 8 580 F.3d 1301, (Fed.Cir.2009)] a particular tool within a larger software  
 9 package may be the relevant “material or apparatus” when that tool is a  
 10 separate and distinct feature. 580 F.3d at 1320-21. In *Lucent*, the  
 11 infringement inquiry accordingly focused on the date-picker, even though  
 12 that tool was included in Microsoft Outlook, a larger software package. *Id.*  
 13       ...[O]ur reasoning in *Lucent* applies equally here... Accordingly, the jury  
 14 was properly instructed that it should focus on the editor, not all of Word.

15       *i4i Ltd. P'ship*, 589 F.3d at 1264-65; see also *Ricoh Co., Ltd. v. Quanta Computer Inc.*, 550 F.3d  
 16 1325, 1336-40 (Fed. Cir. 2008) (The sale of a component without a substantial non-infringing use,  
 17 even when included in a product that, as a whole, does have a substantial non-infringing use,  
 18 constitutes contributory infringement).

19       Here, CAP Co.’s Amended Complaint alleges that the Accused Products use “the methods  
 20 claimed in the patent in this country,” (AC at ¶15), are “designed for use in practicing one or more  
 21 claims of the Patents-in-Suit, where the goods and services constitute a material part of the invention  
 22 and are not staple articles of commerce, and which have no use other than infringing one or more  
 23 claims of the Patents-in-Suit (AC at ¶11), and “has committed these acts with knowledge that the  
 24 goods and services it provides are specially made for use in a manner that directly infringes the  
 25 Patents-in-Suit (AC at ¶17).” These allegations properly call out the infringing components of  
 26 Windows, alleging that they have no substantially non-infringing uses, not that Windows as a whole  
 27 has no such uses.

28       Moreover, substantial non-infringing uses are simply one part of the test for contributory  
 29 infringement. In *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1364 (Fed. Cir. 2012), the Court  
 30 explained, “[t]he existence of a substantial non-infringing use does not preclude a finding of

1 inducement.” In such a case, a patentee may present evidence that “goes beyond a product’s  
 2 characteristics or the knowledge that it may be put to infringing uses, and shows statements or  
 3 actions directed to promoting infringement.” *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325,  
 4 1341 (Fed. Cir. 2008). The Federal Circuit has found actions “directed to promoting infringement”  
 5 where the defendant knew that the accused product’s proposed label would cause at least some users  
 6 to infringe the asserted method claims by following the label instructions. *AstraZeneca LP v. Apotex,*  
 7 *Inc.*, 633 F.3d 1042, 1059 (Fed. Cir. 2010). Here, CAP Co. has alleged such promotion of  
 8 infringement. Further, as demonstrated in CAP Co.’s opposition to the motion, its general  
 9 allegations have been held to be sufficient to state a claim for the required intent to infringe.

10       In *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, the court was faced  
 11 with a complicated series of claims. 681 F.3d 1323 (Fed. Cir. 2012). To more efficiently enable  
 12 delivery in the less-than-a-load trucking industry, the ’078 patent claims a method that “ ‘automates  
 13 the process of receiving transportation documentation and producing advance loading manifests  
 14 therefrom to optimize load planning and dynamic product shipment and delivery control... The  
 15 patented method enables shipping documents to be sent directly from the truck driver to a common  
 16 point...so billing and load planning can occur while the driver is en route with the freight.’ ” *Id.* at  
 17 1329.

18       The claims required the use of scanning and wireless communication technology to transmit  
 19 the documentation to the loading terminals while the trucker was en route. There was no dispute in  
 20 the case that scanning and wireless communications technologies had many non-infringing uses.  
 21 Plaintiff, instead claimed that “...the process for scanning and wirelessly transmitting bills-of-  
 22 lading from the truck cab to the back office for the preparation of loading manifests has no other  
 23 substantial non-infringing use.” *Id.* at 1337-38. The Court rejected this argument since it failed to  
 24 focus on the accused products which were scanners and wireless communication devices. Here, in  
 25 contrast to *Bill of Lading*, the accused instrumentalities are not just optionally used in infringement;  
 26 they incorporate the patented method.

27       On a different note, the evidence that was sufficient to make out an inducement claim in *Bill*  
 28 *of Lading* is similar to what Plaintiff has cited. There, the defendants had promoted the use of their

1 scanning and wireless communication equipment to trucking customers in a manner that arguably  
 2 infringed the patented method. Here, CAP Co. has alleged the same type of promotional and support  
 3 evidence that has induced Microsoft's customers, using the Microsoft anti-virus and firewall  
 4 software, to infringe various claims of the Patents-in-Suit. Unlike the scanning and communications  
 5 technologies in *Bill of Lading*, as alleged by CAP Co., there are no ways to use the accused anti-  
 6 virus and firewall technologies in a non-infringing manner.

7 **III. FUTILITY**

8 The Ninth Circuit has held that a district court “may deny leave to amend due to ‘undue  
 9 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
 10 amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of  
 11 the amendment, [and] futility of amendment.’” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522,  
 12 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In exercising its discretion  
 13 “a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits  
 14 rather than on the pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th  
 15 Cir.1981). Accordingly, “Rule 15’s policy of favoring amendments to pleadings should be applied  
 16 with extreme liberality.” *Id.* (internal quotes omitted).

17 The district court must provide a written finding or a record which clearly indicates reasons  
 18 for the court’s denial of leave to amend to avoid a reversal of that judgment. *See Klamath-Lake*  
 19 *Pharm. Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983). Here, CAP Co.  
 20 clearly can add specific information regarding Microsoft’s advertising, customer promotion and  
 21 support that urge customers to use the anti-virus and firewall products in a manner that infringes the  
 22 patents in suit, including promotion of the particular features which depend on the infringing  
 23 components of those products.

24 **IV. CONCLUSION**

25 For these reasons, CAP Co. respectfully requests the Court to reconsider its April 6, 2015  
 26 order and provide Plaintiff with leave to amend its complaint.

27 Dated: April 17, 2015

28 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Bruce J. Wecker, hereby certify that on the date indicated below, I caused a true and correct copy of the foregoing **PLAINTIFF CAP CO., LTD.'S MOTION TO RECONSIDER** to be served on all parties who have appeared in this matter.

5 | DATED: April 17, 2015 \_\_\_\_\_ /s/ *Bruce J. Wecker*

/s/ Bruce J. Wecker

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